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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG090

Waiver of Requirements under Sections 101(a) and 102(a) of the Marine Mammal Protection Act (MMPA) for the Mid-Barataria Sediment Diversion, the Mid-Breton Sound Sediment Diversion, and Calcasieu Ship Channel Salinity Control Measures Projects

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of a waiver.

SUMMARY: On February 9, 2018, Congress passed the Bipartisan Budget Act of 2018 (Budget Act), which included a requirement that the Secretary of Commerce, as delegated to the Assistant Administrator of the National Marine Fisheries Service (NMFS), issue a waiver of the Marine Mammal Protection Act (MMPA) moratorium and prohibitions for the Mid-Barataria Sediment Diversion, Mid-Breton Sound Sediment Diversion, and the Calcasieu Ship Channel Salinity Control Measures projects, as selected in the Louisiana Comprehensive Master Plan for a Sustainable Coast. NMFS has issued the waiver.

DATES: The waiver was issued on March 15, 2018.

FOR FURTHER INFORMATION CONTACT: Jolie Harrison, Office of Protected Resources, NMFS, (301) 427-8401. The waiver and supporting documents may be obtained online at <https://www.fisheries.noaa.gov/action/marine-mammal-protection-act-waiver-select-louisiana-coastal-master-plan-projects>. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a) of the MMPA (16 U.S.C. 1361 *et seq.*) establishes a moratorium on the taking and importation of marine mammals, along with exceptions to the moratorium. Section 102(a) of the MMPA prohibits, among other things, the taking of marine mammals and includes further exceptions to the prohibitions in certain circumstances. The MMPA defines the term “take” to mean to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. Section 101(a)(3)(A) allows the Secretary of Commerce, as delegated to NMFS, to waive the requirements of section 101 and allow the taking of marine mammals under sections 101(a) and 102(a), provided consultation with the Marine Mammal Commission occurs and certain determinations are made.

On February 9, 2018, the Budget Act (Public Law 115-123) was enacted by Congress. Section 20201 in title II of the Budget Act directs the Secretary of Commerce to, within 120 days of enactment, issue a waiver pursuant to section 20201 and section 101(a)(3) of the MMPA for three projects included in the 2017 Louisiana Comprehensive Master Plan for a Sustainable Coast. Specifically, in Congress’ recognition of their consistency with the findings and policy declarations in section 2(6) of the MMPA, the Budget Act directs the Secretary to issue a waiver for the Mid-Barataria Sediment Diversion, the Mid-Breton Sound Sediment Diversion, and the Calcasieu Ship Channel Salinity Control Measures projects from the requirements of sections 101(a) and 102(a) of the MMPA for the duration of the construction, operation, and maintenance of the projects. The Budget Act further indicates that no rulemaking, permit, determination, or other condition or limitation shall be required when issuing the waiver. Although section 101(a)(3)(A) of the MMPA requires the agency to make certain findings and determinations and

follow certain procedures when issuing a waiver, Congress removed NMFS's discretion under section 101(a)(3)(A) to make those findings and determinations and to follow those procedures to determine whether waiver of the take moratorium is warranted.

Section 20201 of the Budget Act further indicates that, upon the issuance of the waiver, the State of Louisiana (State) shall, in consultation with the Secretary of Commerce: (1) To the extent practicable and consistent with the purposes of the projects, minimize impacts on marine mammal species and population stocks, and (2) Monitor and evaluate the impacts of the projects on such species and population stocks.

Description of the Action

On March 15, 2018, NMFS issued the waiver from the requirements of the MMPA section 101(a) moratorium and section 102 prohibitions for take caused by the Mid-Barataria Sediment Diversion, Mid-Breton Sound Sediment Diversion and Calcasieu Ship Channel Salinity Control Measures projects, as identified in the 2017 Louisiana Comprehensive Master Plan for a Sustainable Coast, as required by the Budget Act. The waiver applies to take caused by construction, operation, and maintenance and remains in effect for the duration of these activities for the three projects. Take that is not caused by the construction, operation, and maintenance of the projects is not covered by the waiver.

Prior to issuing the waiver, NMFS consulted with the Marine Mammal Commission (Commission) on issuance of the waiver, as required under section 101(a)(3)(A) of the MMPA. On March 12, 2018, the Commission provided the following comments and recommendations (the Commission's letter can be found at <https://www.fisheries.noaa.gov/action/marine-mammal-protection-act-waiver-select-louisiana-coastal-master-plan-projects>).

Comments and Responses

Comment 1: The Commission notes Section 20201 of the Budget Act includes a finding that the three identified projects are consistent with the findings and policy declarations in section 2(6) of the MMPA. They note, however, that it is unclear if the projects are consistent with other stated purposes and policies of the MMPA, including maintaining marine mammal species and stocks at optimum sustainable population levels and ensuring that species and stocks do not diminish to the point where they cease to be significant functioning elements in the ecosystems of which they are a part.

NMFS Response: NMFS has no comment regarding Congress' interpretation of the consistency of these projects with different sections of the MMPA.

Comment 2: The Commission recommends that the waiver indicate waiver recipients.

NMFS Response: Congress did not identify specific recipients who should be covered by the waiver. Rather, Congress directed that the waiver should cover all persons (as defined under the MMPA) who will engage in the activities of constructing, operating, and maintaining the three named diversion projects. Therefore, unlike issuance of a typical permit, authorization, or waiver under the MMPA, this waiver applies to any individual or entity that causes the take of marine mammals during construction, operation, or maintenance of the three projects. In fact, it would not be possible for NMFS to identify all individuals and entities who will engage in these activities, especially for projects in the early planning stages or for long-term maintenance.

Comment 3: The Commission recommends that NMFS seek agreement with the State or otherwise clarify that the requirements of section 20201(b) are ongoing responsibilities with consultations between the State and NMFS continuing as needed throughout all construction, operations, and maintenance activities.

NMFS Response: NMFS agrees consultation regarding impact minimization, monitoring, and evaluation should be ongoing as each project develops through design and engineering, construction, operation, and maintenance phases. It is ultimately the State's responsibility to engage in consultation with NMFS and, upon doing so, NMFS will work with the State to develop clear consultation expectations in accordance with the intent of the Budget Act. NMFS anticipates the State will utilize existing environmental review processes (*e.g.*, National Environmental Policy Act (NEPA)), where available, to both begin consultation and develop an approach for ongoing consultation through the various phases for each project.

Comment 4: The Commission recommends that consultations between NMFS and the State begin immediately to review ongoing monitoring programs and update and expand them, as necessary, to ensure that essential baseline information is available before construction begins. Further, the Commission encourages NMFS to seek the advice of appropriate outside experts in helping to design effective monitoring programs.

NMFS Response: For the Mid-Barataria Sediment Diversion, NMFS is a cooperating agency on the project's Environmental Impact Statement (EIS) under NEPA and a member of the Louisiana Trustees. Through these roles, NMFS has been and will continue to evaluate impacts of the project on marine mammals and continue to work with the State on marine mammal monitoring. For example, NMFS, in cooperation with the State's Coastal Protection and Restoration Authority (CPRA), has developed a marine mammal science plan which includes the collection of baseline data on Barataria Bay dolphins through tagging, health assessments, and modeling. This plan was developed with internal and external marine mammal experts, as recommended by the Commission, who led efforts to collect data on Barataria Bay dolphins after the Deepwater Horizon oil spill (*e.g.*, Smith et al., 2017, Well et al., 2017). Phase

I of the science plan is partially complete and NMFS is in discussion with the CPRA on funding for Phase II. For all projects, NMFS intends to continue working with external marine mammal experts to inform development and implementation of a comprehensive marine mammal monitoring plan as part of the State's consultation requirement.

Minimizing and Monitoring Impacts on Marine Mammals

As described above, the Budget Act requires the State, in consultation with the Secretary, to minimize, monitor, and evaluate impacts on marine mammals from the projects included in the waiver. We note here, as recommended by the Commission (see above), that by necessity the consultation will need to be ongoing to appropriately address the evolving project planning and design for the construction, operation, and maintenance phases of these three projects.

Currently, for the Mid-Barataria Sediment Diversion, the State and the U.S. Army Corps of Engineers are coordinating closely with NMFS to ensure compliance under multiple statutes other than the MMPA (*e.g.*, NEPA and the Clean Water Act), and further coordinating in consideration of the Mid-Barataria Sediment Diversion pursuant to the Deepwater Horizon restoration planning efforts. These statutes and processes include various requirements to assess, minimize, and/or monitor impacts to different resources, including marine mammals. While the State has coordinated most closely with NMFS on the Mid-Barataria Sediment Diversion to date, it is likely the other two projects covered under the waiver will be similarly coordinated with NMFS to some degree due to the NEPA processes and permitting requirements under other Federal statutes. We believe that in many cases other statutes and processes will provide the State efficient frameworks within which to conduct the required consultation with NMFS, and we will support the State in integrating Budget Act compliance into these processes, discussions, and timelines, as needed. Regardless, NMFS is prepared to support the State in identifying and

developing practicable measures to minimize and monitor impacts of the covered projects on marine mammals.

Authority: 16 U.S.C. 1361 *et seq.*

Dated: March 15, 2018.

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National Marine Fisheries Service.

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